IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

HARRY C. RITTER and CHRIS KNAUR,
Petitioners

V.

WYOGA GAS AND OIL CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below.

(Set forth page 2 supra)

Jurisdiction.

(Set forth page 2 supra)

Statement of the Case.

(Set forth page 3 supra)

Specification of Error.

The Circuit Court of Appeals for the Third Circuit erred in dismissing the petitioners' appeal on the ground that the order appealed from is an interlocutory one which may not be made the sole basis of an appeal.

Argument.

The petitioners are seeking an exercise of the supervisory powers of your Honorable Court for the correction of an error of the Circuit Court of Appeals made in refusing to determine the merits of the petitioners' motion to dismiss the complaint, which motion goes to the very jurisdiction of the Federal District Court to entertain the cause.

It is submitted that a well founded objection to the jurisdiction of a Federal District Court to determine a case instituted therein on the basis of diversity of citizenship is of such a nature that it may be made the sole basis of an immediate appeal, and that such appeal must be determined on its merits by the Circuit Court of Appeals.

It is fundamental that the right to sue in a Federal District Court on the ground that there is a controversy between the citizens of different states is not derived from the Constitution, but from Congress, and must be exercised within the limitations established. See Kline v. Burke Constr. Co. 260 U. S. 226, S. Ct. 79, 67 L. ed. 226 (1922).

With respect to the jurisdiction of Federal District Courts on the basis of diversity of citizenship, section 51 of the Judicial Code, 28 U. S. C. A. 112, provides in part as follows:

> "***but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;"

It is established by the decisions construing this Section of the Judicial Code that, if suit is instituted in the District Court of the State and district in which the defendants reside, such state and district must be the residence of **all the defendants.**

In Simkins Federal Practice, Revised Edition, Sec. 397, page 305, this principle is expressed as follows:

> "This means that where there is more than one plaintiff, or more than one defendant, in **personal actions,** suit must be brought in the **State** and **district** in which all the plaintiffs are inhabitants, if brought in plaintiffs' residence district, or where all the defendants are inhabitants, if brought in defendants' residence district."

To the same effect, see the case of Smith vs. Lyon, 133 U. S., 315, 33 L. ed. 635, 10 S. Ct. 303 (1890).

When one or more defendants are not residents of the state and district in which suit was brought, and in which the co-defendants reside, jurisdiction is sometimes maintained by dismissing the suit as to the non-resident defendants. However, this may not be done, and jurisdiction is ousted if any of the non-resident defendants are indispensable parties.

Referring again to Simkins Federal Practice, Revised Edition, the following statement appears in Section 507, page 464:

> "If then the issue arises that parties who are indispensable, have not been joined, or it should so appear during the trial, the court must either dismiss the case or hold it until they are made parties; **and if to make them parties would destroy the diversity of citizenship, and thereby oust the jurisdiction of the court, then the court cannot enter-**

tain jurisdiction of that case, and should dismiss at once, for the court cannot proceed if the absent defendants are indispensable."

In the case of Waterman v. Canal-Louisiana Bank and Trust Co., et al., 30 Sup. Ct. 10, 215, U. S. 33, 54, Law, Ed. 80, (1909), the Court commented as follows upon the issue of indispensable parties in a suit instituted in a Federal Court on the basis of diversity of citizenship:

> "And there is a third class whose interests in the subject-matter of the suit and in the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In accordance with these principles governing the jurisdiction of Federal District Courts, the petitioners moved to dismiss the complaint for lack of jurisdiction. This motion was based upon the fact that two of the defendants, who are indispensable parties to the litigation, are not residents of the State and District in which suit was brought. (R-53).

As has already been indicated, the petitioners contended that the causes of action averred in the complaint comprehended, not only claims based on alleged joint torts which might result in joint and several liability that could be determined in the absence of the non-resident defendants, but also included claims for accounting and rescission of contract which were inseparably connected with each of the other causes of action and which, under all authorities, could not be determined in the absence of the two non-resident defendants.

The issue thus raised by the petitioners is fundamental, and upon its determination depends whether the proceedings in the Federal District Court are a nullity, and whether the District Court has any jurisdiction whatsoever to hear and determine the cause.

Instead of deciding the merits of this issue on appeal, the Circuit Court of Appeals dismissed the appeal on the ground that the order appealed from was interlocutory, citing as authority only the case of Grand Trunk Western Ry. Co. v. McHie, 100F 2nd. 86 (1938).

It is submitted that this action of the Circuit Court of Appeals is clearly erroneous and calls for an exercise of your Honorable Courts' supervisory and corrective powers.

An order overruling a well founded objection to the jurisdiction of a Federal District Court, particularly when based upon the allegations of the plaintiff's complaint, is not within the category of an interlocutory order. The jurisdiction of the Court to proceed in a case of this type is such a fundamental and indispensable requirement that any order assuming jurisdiction, over the objection of the defendant is a finality in its legal significance and must be determined on the merits if appealed from.

See: Salem Kings Products Co. vs. LaFollette, Ore. 196 Pac. 416 (1921).

Furthermore, an order overruling an objection to the jurisdiction of a Federal District Court to entertain a suit based on diversity of citizenship, even if superficially similar to an interlocutory order, is not within the intent of the rule which prohibits preliminary appellate review of interlocutory orders.

It has long been the policy of Appellate Courts to dismiss appeals from purely interlocutory orders, and to save needless expense and delay by postponing any review of such orders until the entire case has been determined by the court of original jurisdiction.

However, in a case such as that here presented by the petitioners, where the order appealed from determines the jurisdiction of the Federal Court to entertain the case, the refusal of the Circuit Court to decide the appeal on its merits may well cause tremendous unnecessary expense and hardship to both the parties and to the Federal District Court.

The plaintiff's complaint avers nine causes of action, each of which is very complex in nature. More than two hundred numbered paragraphs are necessary to set forth these causes of action, and it will require a considerable period of time and a large number of witnesses to present the proof which will be necessary in connection with these averments.

If the parties are forced to proceed with the trial of the case, and it is then confirmed that the Federal Court had no jurisdiction, large sums will have been wasted in costs and attorneys fees, and the valuable time of the trial court, and the twenty-six defendants will have been unnecessarily consumed.

It might be pointed out that, in recognition of the hardships which exist in situations of this type, the State Appellate Courts of the district have been directed to determine, on their merits, appeals based solely on orders of inferior courts assuming jurisdiction over the objection of the defendants.

Under the Pennsylvania Act of 1925 P. L. 23, (12 P. S. 672-674,) any question of jurisdiction over the parties defendant or the cause of action, whenever raised in the first instance, may be preliminarily determined by the court, and the decision may be appealed to the Supreme or the Superior Court of the State, as in the case of final judgments.

In the case of Gallagher v. Keystone R. H. Co., et al. 333 Pa. 9 (1939), the Pennsylvania Supreme Court made the following comment relative to the purpose of this statute:

> "While the general rule is that appeals do not lie from such orders, the legislature recognized that parties wrongly brought in should not be put to the expense and inconvenience of a trial on the merits, which had resulted from the rule that such orders were unappealable, and passed the Act of March 5, 1925, P. L. 23, 12 P. S. Section 673, allowing appeals from such interlocutory orders for the limited purpose of questioning, before trial, the jurisdiction over the defendant or of the cause of action for which suit is brought': section 1."

It is submitted that the action of the Circuit Court of Appeals for the Third Circuit, in dismissing the petitioners' appeal without determining the merits of their well founded objection to the Federal Court's jurisdiction was entirely unwarranted and unjustified. The Circuit Court advanced no adequate authority for its ruling, and it is clearly erroneous. The situation is one which merits an exercise of the supervisory and corrective powers of this Honorable Court, and, there-

fore, a writ of certiorari should issue in order that the action of the Circuit Court of Appeals for the Third Circuit may be reviewed.

J. FRED KATZMAIER

THOMAS WOOD

WM. H. WOOD

Counsel for petitioners.